RECORD AND BRIEFS

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No. 15-8049

IN THE

Supreme Court of the United States

Duane Edward Buck,
Petitioner-Appellant

v.

William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSION TO PETITION FOR WRIT OF CERTIORARI

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CERTIORARI REVIEW IS WARRANTED BECAUSE DUANE BUCK'S DEATH PENALTY CASE INVOLVES AN EXTRAORDINARY COMBINATION OF INEFFECTIVE ASSISTANCE OF COUNSEL AND EXPLICIT RACIAL BIAS WHICH, IF LEFT UNCORRECTED, WILL DEEPLY UNDERMINE CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

Duane Buck is an African-American man who was sentenced to death after his own attorneys knowingly presented "expert" testimony and an "expert" report – by Dr. Walter Quijano – stating that Mr. Buck was more likely to be a future danger because he is Black. Left uncorrected, trial counsel's injection of explicit racial discrimination into Mr. Buck's capital sentencing profoundly undermines confidence in the integrity of both Mr. Buck's death sentence and the criminal justice system overall.

In 2000, the Texas Attorney General acknowledged the unconstitutionality of Dr. Quijano's race-as-dangerousness testimony, declaring: "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," and the "infusion of race as a factor for the jury to weigh in making its determination violate[s]" a capital defendant's "right to be sentenced without regard to the color of his skin." Resp. to Pet. For Cert. at 7-8, *Saldaño v. Texas*, 530 U.S. 1212 (2000). Texas therefore promised to concede constitutional error and waive its procedural defenses in six capital cases,[1] including Mr. Buck's. Texas kept its promise in every case *except Mr. Buck's*. In Mr. Buck's case, Texas has arbitrarily

[1] Press Release, Office of the Tex. Att'y Gen., *U.S. Supreme Court Grants State's Motion in Capital Case* (June 5, 2000) (Rule 60(b) Mot. Ex. 3), *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. Jan. 7, 2014), ECF No. 49-1, p. 17; Press Release, Office of the Tex. Att'y Gen., *Statement from Attorney General John Cornyn Regarding Death Penalty Cases* (June 9, 2000) (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan. 7, 2014), ECF No. 49-1, p. 19.

reneged on its promise and aggressively defended the constitutionality of his racially-biased death sentence.

The singular and exceptional nature of this case warrants this Court's review. No constitutional rule is more important than the dictate that race must play no role in a criminal sentence, much less a capital sentence. Yet, the Fifth Circuit disregarded this fundamental principle, declaring that Mr. Buck's claim is "unremarkable as far as IAC claims," and denied a COA. App. B at 9. Certiorari review is required because the Fifth Circuit's decision not only "impairs the confidence of the public in the administration of justice," it also harms "the law as an institution," and "the democratic ideal reflected in the processes of our courts." *Rose v. Mitchell*, 443 U.S. 545 (1978). Furthermore, the decision below implicates two entrenched circuit splits that Texas wholly disregards in its opposition.

In his Brief in Opposition (hereinafter "BIO"), the Director opposes relief by (again) presenting of a version of Mr. Buck's case that is "obviously not accurate." *Buck v. Thaler*, 132 S. Ct. 32, 37 (2011) (Sotomayor, J., dissenting).

First, the Director's assertion that Dr. Quijano's opinion was "inherently mitigating" and did not address future dangerousness, BIO at 1, 22, is flatly refuted by the record. On direct examination, Dr. Quijano testified that there were six "statistical factors we know to predict future dangerousness," including, "Race. It's a sad commentary that minorities, Hispanic and black people, are over represented in the criminal justice system." *Id.*, Sentencing Hr'g. Tr. 110:8-14, 111:1-4, May 6, 1997, *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), (ECF No. 5-

114, pp. 3-4) (emphases added). And Dr. Quijano's report identified seven statistical factors he "considered in answer to the question of [Mr. Buck's likely] future dangerousness," including: "Race. Black. Increased probability." 3/8/97 Forensic Psychological Evaluation at 7, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), (ECF No. 5-118, p. 24); *Buck*, 132 S. Ct. at 33 (Opinion of Alito, J.) (quoting report). Because this opinion explicitly supported an aggravating factor – the special issue addressing future dangerousness – it was not mitigating.[2]

Second, the Director's contention that counsel made a "considered" and "strategic" decision to rely on Dr. Quijano, BIO at 20, is both speculative and nonsensical. Trial counsel has never explained the decision to retain Dr. Quijano. And no reasonable, competent attorney whose goal was to "portray Buck as nonviolent and unlikely to be a future danger," BIO at 4, would rely on an expert with an inflammatory and racially bigoted view to the contrary, especially when other experts, who did not harbor or rely on false stereotypes about race, were available.[3]

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[2] Moreover, the Director's argument is inconsistent with his closing argument at trial urging the jury to rely on Dr. Quijano's testimony to find Mr. Buck a future danger. *See Callanan Rd. Improvement Co. v. United States*, 345 U.S. 507, 513 (1953) (party estopped from "blow[ing] hot and cold" by taking position contrary to position it took in prior proceeding); 1 J. Strong, McCormick on Evidence § 55, p. 246, n. 14 (5th ed. 1999).

[3] *See, e.g., Griffith v. State*, 983 S.W.2d 282, 293 (Tex. Crim. App. 1998) (Dr. Mitchell Young, who had significant experience evaluating and treating men with a history of domestic abuse and had worked in the Institutional Division of the Texas Department of Criminal Justice, served as a defense expert in a 1995 Texas capital trial and testified that Griffith was not likely to be dangerous in the future), *cert. denied*, 528 U.S. 826 (1999); *Scheanette v. Quarterman*, 482 F.3d 815, 820-21 (5th Cir. 2007) (Dr. Gilda Kessner testified as a defense expert that, after conducting a risk assessment, she was able to determine that the defendant was not likely to be dangerous in the future); *Walbey v. Johnson*, 309 Fed. App'x 795, 804 (5th Cir. 2009)) (Dr. Curtis Edwin Willis testified as a defense expert in a 1996 Texas capital trial that the specific character traits of the defendant rendered him unlikely to be dangerous in the future).

Third, Texas misrepresents the record to claim that Dr. Quijano's testimony was not prejudicial. The testimony that Texas calls "inherently mitigating," was in fact false, "bizarre and objectionable."[4] Further, while the facts of Mr. Buck's crimes are undeniably egregious, the State's future dangerousness case was far from overwhelming: the undisputed evidence showed that Mr. Buck had performed well in prison; and the jury did not make a decision until after it sent out three notes, the last of which requested to review the expert reports (including Dr. Quijano's) again.

Mr. Buck is entitled to certiorari review and a COA.

A. Mr. Buck's Case is Extraordinary and He Is Entitled to a Certificate of Appealability.

As explained in Mr. Buck's Petition at 22, a COA is required if "reasonable jurists could either disagree with the district court's decision or 'conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 327, 336 (2003) (internal citation omitted). The panel decision denying Mr. Buck a COA did not adhere to this clearly established law Instead, in departing from that standard, it deepened two significant circuit splits, Petition at 26, 28-29; relied on an inappropriate, piecemeal merits analysis, *id.* at 24-28; ignored the overriding significance of racial discrimination, *id.* at 30-33; and, ultimately, failed to acknowledge the debatability of the district court's decision.

The Director's Opposition does not address the errors in the panel's decision, the debatability of the district court's decision, or the fact that this case implicates

[4] *Buck*, 132 S. Ct. at 33 (Alito, J.).

an issue of national importance. Instead, the Director incorrectly asserts that in order to secure a COA, Mr. Buck must "establish the denial of a valid constitutional claim," BIO at 16-17, and dedicates his Response to a series of inaccurate arguments about the merits of Mr. Buck's 60(b) motion and ineffective assistance of counsel claim. The Director's misplaced arguments neither refute nor alter the conclusion that the district court's decision is at least debatable.

1. The Panel Decision Deepens Two Circuit Court Splits.

As detailed in Mr. Buck's Petition at 26, 28-29, the panel decision contributes to two significant circuit splits relating to the proper application of the COA standard. Certiorari should be granted to resolve these splits.

First, a comparison of the outcomes of COA applications filed by capital § 2254 petitioners in the Fourth, Fifth and Eleventh Circuits over the last five years shows that a COA was denied on all claims by both the district court and the court of appeals 59% of the time in the 5th Circuit, 6.25% of the time in the Eleventh Circuit and 0% in the Fourth Circuit. *See* Petition at 26; App. F Thus, the Fifth Circuit imposes a far more burdensome standard than the Fourth or Eleventh Circuits.

Second, the Fifth Circuit's decision in Mr. Buck's case further entrenches a circuit split regarding the applicability of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to 60(b) relief. The Fifth and Eleventh Circuits have concluded that *Martinez* is not an extraordinary circumstance, while the Third and Seventh Circuits have

concluded that *Martinez* is a factor that can be considered in a motion for 60(b) relief. *See* Petition at 28-29.

The Director asserts that Mr. Buck failed to present a "special or important reason," BIO at 9, justifying the grant of certiorari – such as "if the court of appeals entered a decision on an important question of federal law that conflicts with another court of appeals." *Id.* Because, however, Mr. Buck's petition does just this, it is clear that the Director ignored the circuit splits discussed in Mr. Buck's petition.

2. The District Court's Extraordinariness Decision is Debatable.

As detailed in Mr. Buck's Petition at 24-26, in order to reach the conclusion that Mr. Buck was not entitled to a COA, the circuit panel improperly "sidestep[ped the threshold COA] process by first deciding the merits of [Mr. Buck's] appeal, and then justifying its denial of a COA based on its adjudication of the actual merits." *Miller-El*, 537 U.S. at 336-37; *see* App. A at 2 (Dennis, J., dissenting). The panel then "'dismisse[d], miscast[], and minimize[d] [Mr. Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone,' proves extraordinary circumstances." App. A at 4 (Dennis, J., dissenting) (citation omitted). A proper analysis of Mr. Buck's case "describe[s] a situation that is at least debatably extraordinary," *id.*, and demonstrates that Mr. Buck is entitled to a COA.

The Director's Opposition does not address the debatability of the district court's decision and, instead, disputes the extraordinariness of some of the factors

relied on by Mr. Buck to demonstrate his entitlement to 60(b) relief, BIO at 11 16; argues that "if each circumstance standing alone is not extraordinary, the combination of them cannot be extraordinary," BIO at 12; and, concludes that Mr. Buck's purported failure to demonstrate the extraordinariness of each of his proffered circumstances establishes that he is not entitled to 60(b) relief and a COA. The Director is incorrect.

a. The Proper 60(b) Analysis

Because the Director asserts that each of Mr. Buck's proffered facts and circumstances must be independently extraordinary in order to secure 60(b) relief, BIO at 12, he conducts the same kind of flawed, piecemeal analysis as the circuit panel, App. B at 8-10, and the district court, App. D at 8-10. Because, however, several of the factors discussed by Mr. Buck are individually extraordinary, when considered collectively, they are at least debatably so. Texas's contrary arguments rely on a "'dismissive and strained interpretation'" of Mr. Buck's evidence which this Court has rejected in both the COA and merits context. App. A at 5 (citing *Miller-El*, 537 U.S. at 344; *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005)).

b. The Explicit Racial Bias in Mr. Buck's Capital Sentencing

The panel's failure to acknowledge the racial discrimination in Mr. Buck's case is a fundamental error, Petition at 30-32, and the district court's decision that counsel's introduction of race-as-dangerousness evidence was "*de minimis*" and did not support a finding that Mr. Buck's case is extraordinary, App. D at 10, is plainly debatable. In capital cases, "there is a unique opportunity for racial prejudice to

operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). That risk is increased where, as here, future dangerousness is at issue and "a juror who believes that blacks are violence prone might well be influenced by that belief," in deciding whether to impose a death sentence. *Id.* Thus, this Court has engaged in "unceasing efforts to eradicate racial discrimination from our criminal justice system," App. D at 14 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) – especially in capital cases.

The Director contends that the racial discrimination in Mr. Buck's case cannot support a finding of extraordinariness because it "has been repeatedly and exhaustively reviewed by the lower courts." BIO at 14. The Director is wrong.[5]

First, Mr. Buck's race-based ineffectiveness claim has never received full merits review. Because the claim was defaulted, *see* Petition at 7, 10, it was not until this Court announced its decisions in *Martinez v. Ryan* (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) – creating, for the first time, an opportunity for federal court review of defaulted claims of trial counsel ineffectiveness – that Mr. Buck had the opportunity to litigate it.

Second, the explicit racial discrimination at the heart of Mr. Buck's case has been condemned by the only courts that have directly addressed it. Justice Alito

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[5] Texas suggests that Mr. Buck was not diligent in seeking relief under Rule 60(b) because "*Trevino* was handed down on May 28, 2013" and "Buck waited until January 2014" to file his Motion. BIO at 13 n. 17. When *Trevino* was announced, however, Mr. Buck's state habeas application was pending before the Texas Court of Criminal Appeals ("CCA"). Under Texas law, the immediate post-*Trevino* filing of a Rule 60(b) motion in federal court could have precipitated the dismissal of Mr. Buck's pending application for state post-conviction relief and jeopardized his opportunity to secure substantive relief from the state court. *See Ex Parte Hernandez*, No. WR-63,282-02 (Tex. Crim. App. Nov. 25, 2009). The CCA denied relief on Mr. Buck's state habeas petition in November 2013, and Mr. Buck then promptly filed his 60(b) Motion.

described Dr. Quijano's testimony as "bizarre and objectionable," *Buck*, 132 S. Ct. at 33; Justice Sotomayor characterized Mr. Buck's case as "marred by racial overtones" that "our criminal justice system should not tolerate," *id.* at 35; and the district court below concluded that Dr. Quijano's testimony "lends credence to any potential latent prejudice held by the jury." App. D at 14. By contrast, the Fifth Circuit failed entirely to acknowledge or address the significance of the racial discrimination injected into Mr. Buck's capital sentencing proceedings. That was an extraordinary, fundamental error.

Texas's arguments do nothing to refute the fact that the express opinion of a defense "expert" witness that Mr. Buck is more deserving of a death sentence because he is Black (at least debatably) constitutes an extraordinary circumstance.

c. The Role of *Martinez* in a 60(b) Motion

The Director, BIO at 12-13 – like the panel, App. B at 7, and the district court below, App. D at 8 – contends that *Martinez* and *Trevino* categorically cannot be an extraordinary circumstance warranting Rule 60(b) relief. As detailed above and in Mr. Buck's Petition at 28-29, that is the position of the Fifth and Eleventh Circuits. The Third and Seventh Circuits, however, have held that *Martinez* is among the equitable circumstances that may support a motion for 60(b) relief. This circuit split, which Texas does not address, confirms the debatability of the district court's decision and supports Mr. Buck's entitlement to a COA.

d. The Director's Broken Promise Supports a Finding that Mr. Buck's Case is Extraordinary.

Texas's arbitrary failure to keep its promise to waive its procedural defenses and concede the unconstitutionality of Dr. Quijano's race-as-dangerousness testimony in Mr. Buck's case supports his entitlement to 60(b) relief. *See* Petition at 8-9, 15. The Director adopts and reiterates the district court's arguments that Mr. Buck has not proven he has "legally enforceable rights" or an equitable basis for requiring Texas to honor its promise, App. D. at 10, as well as the panel's conclusion that Mr. Buck has not proven the existence of a promise, App. B at 3-4, n.1. Additionally, the Director asserts that Mr. Buck has no right to a particular response from the State, and that Texas's differential treatment of Mr. Buck is justified because his is the only case where Dr. Quijano's racist opinion was presented by the defense. BIO at 14-15 (citations omitted). The Director is wrong. The district court's decision is debatable.

First, it is undisputed that in 2000 the Texas Attorney General made widely reported public announcements stating that he would concede constitutional error and waive procedural defenses in six cases, including Mr. Buck's.[6] The fact that Texas's highest elected prosecutor made such a public declaration, honored his word in every case except Mr. Buck's, and has offered no (reasonable, consistent, or reliable) explanation for his differential treatment of Mr. Buck is extraordinary, regardless of whether the Attorney General communicated a legally binding

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[6] *See, infra*, n.1. *See also* Jim Yardley, *Racial Bias Found in Six More Capital Cases*, N.Y. Times, June 11, 2000, http://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.html.

promise directly to Mr. Buck. However, any dispute about whether Texas make a specific promise to Mr. Buck (which the Director cannot and does not deny were made) is not a basis for denying Mr. Buck's 60(b) motion. It is instead the basis for an evidentiary hearing to assess the existence of the promise.

Second, the fact that Texas's broken promise does not itself afford Mr. Buck a basis for legal relief is irrelevant: extraordinary circumstances are not limited to constitutional or other federal errors. To the contrary, conduct such as "unfair surprise" can form the basis for a proper 60(b) motion even though it does "not show that petitioner's federal rights were violated during the state criminal proceedings that resulted in his conviction." *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001). Moreover, because Texas made its promise based on its recognition that race-as-dangerousness testimony in a capital sentencing trial is so extraordinary that it requires the state to take the extraordinary step of waiving its procedural defenses, Texas's promise is powerful evidence that Mr. Buck's case is extraordinary regardless of whether Mr. Buck relied on it.

Third, the Director has offered a variety of "inaccurate" explanations, *Buck*, 132 S. Ct. at 34, for why Texas kept its promise to every prisoner except Mr. Buck. The Director now asserts that the reason for its arbitrary differential treatment of Mr. Buck is that Dr. Quijano's race-as-dangerousness testimony was elicited by the defense on direct examination, and not the prosecution. BIO at 16. But this explanation, too, is "inaccurate."

During the Texas Attorney General's 2000 search for death-sentenced prisoners whose cases involved unconstitutional testimony by Dr. Quijano, the AG's Office initially identified *eight* cases that appeared to warrant a confession of error. However, upon further review, two of the eight cases were deemed inappropriate for the promised relief. The Attorney General concluded that one of the two excluded cases – the Anthony Graves case – did not warrant a concession of error *because Dr. Quijano's race-as-dangerousness testimony was elicited by the defense on direct examination*. *See* Press Release, Office of the Tex. Att'y Gen., *Statement from Attorney General John Cornyn Regarding Death Penalty Cases* (June 9, 2000) (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan, 7, 2014), ECF No. 49-1, p. 19. Thus, the Attorney General excluded the Anthony Graves case because his lawyers presented Dr. Quijano's race-as-dangerousness opinion during direct examination (and the prosecutor urged the jury to disregard Dr. Quijano's testimony), but the Attorney General chose not to exclude Mr. Buck's case even though Mr. Buck's lawyers did the same thing (but the prosecutor reiterated and relied on Dr. Quijano's testimony). Thus, the Director still has no legitimate reason for his broken promise to Mr. Buck.

Texas's broken promise to Mr. Buck is in and of itself extraordinary, or at the very least, debatably so.

3. The District Court's Ineffective Assistance of Counsel Decision is Debatable.

The district court properly found that Mr. Buck's counsel was deficient in relying on Dr. Quijano. App. D. at 14. The Director, however, claims that the

decision below denying Mr. Buck a COA can be justified because counsel made a "strategic" and "considered" decision to introduce Dr. Quijano's testimony, which was "inherently mitigating," BIO at 20, 22. The Director's misrepresentations dramatically underscore the need for this Court's review.

First, as detailed above, there is no record evidence suggesting that counsel made a strategic, much less considered, decision to rely on Dr. Quijano.

Second, as discussed above, there was nothing mitigating about Dr. Quijano's race-as-dangerousness testimony. Indeed, Texas's assertion to the contrary is "bizarre and objectionable." *Buck*, 132 S. Ct. at 33 (opinion of Alito, J.). Furthermore, Texas's hypothetical that *some* counsel in *some* case may have a reasonable basis for presenting evidence related to race and the criminal justice is irrelevant. Because it was patently unreasonable for Mr. Buck's counsel to present evidence that his race made him more likely to be a future danger, and therefore more deserving of death,[7] the district court correctly concluded that counsel "recklessly expos[ed] his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests," App. D at 14.

The district court clearly (and at least debatably), erred by concluding that the impact of Dr. Quijano's race-as-dangerousness evidence was "*de minimis*," such that counsel's deficient performance was not prejudicial. App. D at 10, 15. Indeed,

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[7] The Fifth Circuit's decision in *Granados v. Quarterman*, 455 F.3d 529 (5th Cir. 2006), is inapposite. In *Granados*, Dr. Quijano never evaluated the defendant and only testified about the overrepresentation of minorities in the prison system. *Id.* at 534, 536 n.9. By contrast, in Mr. Buck's case, Dr. Quijano not only evaluated Mr. Buck, he also unequivocally testified, and stated in his written report, that Mr. Buck's race increased his likelihood of future dangerousness.

a majority of the Justices of this Court have already rejected the district court's "*de minimis*" theory. Specifically, Justice Alito, joined by Justices Scalia and Breyer, concluded that, if admitted by the prosecution, Dr. Quijano's testimony was sufficiently harmful to establish a constitutional violation for prosecutorial misconduct, and, by necessary implication, to warrant habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Buck*, 132 S. Ct. at 33. Justice Sotomayor, joined by Justice Kagan, similarly made clear that Dr. Quijano's testimony was harmful. *Buck*, 132 S. Ct. at 35 (Sotomayor, J., dissenting from the denial of certiorari).

The Director focuses almost exclusively on the aggravating facts of Mr. Buck's crimes in his attempt to demonstrate the absence of prejudice. However, if the heinous facts of a capital offense were sufficient to show that a legal error was not prejudicial, "habeas relief would virtually never be available, so testing for it would amount to a hollow judicial act.'" *Walbey v. Quaterman*, 309 F App'x 765, 804 (5th Cir. 2009) (quoting *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001)). And, indeed, prejudice has been found in comparable or more aggravated cases than Mr. Buck's.[8]

Moreover, the Director scarcely addresses the key issue at Mr. Buck's sentencing: *viz.*, whether he was likely to commit criminal acts of violence in the

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[8] *See, e.g., Porter v. McCollum*, 558 U.S. 30 (2009) (finding *Strickland* prejudice in a case where the defendant, based on plans he made well in advance, shot and killed his ex-girlfriend and her new boyfriend in the course of a home invasion in which he also assaulted his ex-girlfriend's daughter); *Williams v. Taylor*, 529 U.S. 362, 367-69, 398-99, 418 (2000) (finding *Strickland* prejudice even though the capital murder was "just one act in a crime spree that lasted most of Williams's life," and included two violent assaults on elderly victims in the months after the capital murder, one of which left the victim in a vegetative state); *Rompilla v. Beard*, 545 U.S. 374, 378, 391-93 (2005) (finding *Strickland* prejudice even though the petitioner deliberately tortured the victim and had a significant history of convictions involving the use or threat of violence, including raping and slashing a woman during a burglary).

future, which the jury had to find before sentencing him to death. On this dispositive point, the prosecution's case was tenuous at best: the undisputed evidence was that Mr. Buck performed well in prison, as predicted by the other defense expert, Dr. Lawrence. The jury did not find the sentencing decision to be easy and, indeed, did not announce its decision on the special issues until after the foreman sent three notes to the judge during deliberations, the last of which requested the psychology and police reports, including the very report in which Dr. Quijano unequivocally stated: "Race. Black. Increased probability." *See* 3/8/97 Forensic Psychological Evaluation at 7, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), (ECF No. 5-118, p. 24)

The trial court's instruction to the jury "'not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice public opinion, or public feeling *in considering all of the evidence before [them]* and in answering,' the future dangerousness special issue" BIO at 22 (emphasis added), did nothing to prevent the jury from considering – or giving great weight to – Dr. Quijano's race-as-dangerousness opinion because that opinion was among the evidence that the jury was required to consider.

CONCLUSION

For the reasons stated above and in Mr. Buck's Petition for Certiorari, this Court should grant certiorari and a Certificate of Appealability.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner-Appellant,

v

WILLIAM STEPHENS, DIRECTOR, DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that all parties required to be served, have been served, on this 4th day of April, 2016, in accordance with U.S. Supreme Court Rule 29.3, one (1) copy of the foregoing **REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI** by placing said copy in the U.S. mail, first class postage prepaid, addressed as listed below. I further certify that in accordance with Supreme Court of the United States Rule 29.3, an electronic version of the foregoing was also served.

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Subscribed and Sworn to before me this 4th day of April, 2016.

KAREN PIERANGELI
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2020.